PP

v.

PETER KONG

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[CRIMINAL APPEAL NO: 41-17-2003-II]
22 NOVEMBER 2004

CRIMINAL PROCEDURE: *Sentence - Drug addict - Charge of intentionally escaping from lawful custody at rehabilitation centre - Whether magistrate erred in ordering release on bond of good behaviour in the sum of RM5,000 with two sureties for a period of two years - Drugs Dependants (Treatment and Rehabilitation) Act 1983, s. 19(3) - Criminal Procedure Code, s. 294*

CRIMINAL PROCEDURE: *Appeal - Filing of appeal - Petition filed within 10 days of receipt of notes of proceeding - Whether 10-day requirement satisfied - Criminal Procedure Code, s. 307(4), (5)*

CRIMINAL PROCEDURE: *Appeal - Notice of appeal - No intitulement - Whether a ground for striking out*

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Petition did not use the word "order" but instead used the word "sentence" - Whether accused prejudiced - Whether oral application to substitute the word "sentence" with "order" allowed - Criminal Procedure Code, s. 310*

The respondent pleaded guilty in the magistrate's court to a charge of intentionally escaping from lawful custody at a rehabilitation center, an offence punishable under s. 19(3) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The learned magistrate ordered the respondent to be released on a bond of good behaviour in the sum of RM5,000 with two local sureties for a period of two years ('the said order'). The deputy public prosecutor ('DPP') appealed against the order of the learned magistrate and the respondent raised three preliminary objections. Firstly, whether the petition of appeal was filed in time. Secondly, that there was no intitulement in the Notice of Appeal. Thirdly, that the petition of appeal did not use the word "order" but instead used the word "sentence" whereas the notice of appeal had stated that the appeal was against the inadequacy of the said order.

Held (allowing the appeal):

[1] The DPP filed the petition of appeal upon receipt of the notes of proceedings as the magistrate did not write any grounds of judgment per se in respect of the appeal against the inadequacy of the said order. However, the 10-day limit requirement applied in both instances. Accordingly, an appellant has to lodge the petition of appeal within the prescribed period when he is served with the grounds of decision or when he is served with a notice that a copy of the notes of evidence can be obtained upon application. This is evident from sub-s. 5 read with sub-s. 4 of s. 307 of the Criminal Procedure Code ('CPC'). (p 137 a-f)

[2] The governing provisions in respect of appeals to the High Court are in Chapter XXX of the CPC encompassing ss. 303A till 322. Nowhere in these provisions are there any requirement for any intitulement to be cited in a notice of appeal. (p 137 h)

[3] The error in not using the word "order" in the petition of appeal did not cause any miscarriage of justice to the respondent as the notice of appeal expressly stated against "inadequacy of order". Also, the respondent signed the bond of good behaviour with his 2 sureties when the magistrate imposed the said order. The oral application of the DPP to substitute the word "sentence" with the word "order" under s. 310 of the CPC was allowed. (p 138 a-g)

[4] Pursuant to s. 325 of the CPC, the court in the exercise of its discretionary powers can only exercise those powers conferred by ss. 311, 315, 316 and 317 of the CPC. Those sections are not applicable in addressing the respondent's request to rectify the detention order of the respondent made pursuant to s. 6 of the Act. The power of the judge at the hearing of an appeal "from any other order" is only to "alter or reverse such order" but the judge is not empowered to quash or invalidate the detention order. Therefore the detention order could not be quashed save that another application be made for *habeas corpus.* (p 139 c-e)

[5] Section 19(3) of the Act states that the respondent on conviction shall be liable to imprisonment not exceeding five years or to whipping not exceeding three strokes or to both. Imprisonment is not mandatory. Notwithstanding, the offence is a serious offence of a custodial nature rather than imposition of a fine. The respondent also had previous convictions and had escaped from the rehabilitation centre. The period of

detention and supervision and other rehabilitative methods are aimed to secure the well being of drug dependants including the respondent. The court would be failing in its duty as a custodian of justice if it did not mete out an appropriate sentence that would serve as a deterrent sentence to the respondent and other likely offenders. Having been certified as a drug dependent, it was in the respondent's interest that he remained at the rehabilitation centre. As to abuse by the officer in charge as alleged by the respondent, there was no proof of such abuse. Therefore, pursuant to s. 316(c) of the CPC the said order and sentence should be altered to 12 months' imprisonment. (pp 141 a-c & 142 c-g)

Case(s) referred to:
Chong Siew Choong v. PP [1996] 2 CLJ 823 HC ***(dist)***
Jayanthan v. PP [1973] 2 MLJ 68 ***(refd)***
Muhammad Atam Abdul Wahab v. Minister of Home Affairs & Anor [2000] 8 CLJ 402 HC ***(refd)***
PP v. Lim Hong Chin [1994] 1 CLJ 79 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Kok Wai [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Yap Chong Fatt [1963] 29 MLJ 136 ***(refd)***
Tan Tek Seng v. PP [1990] 2 CLJ 103; [1990] 3 CLJ (Rep) 196 HC ***(refd)***
Teo Siew Peng & Ors v. PP [1985] 2 MLJ 125 ***(refd)***
Veerasingam v. PP [1958] MLJ 76 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 294, 307(4), (5), 310, 311, 315, 316(c), 317, 325
Dangerous Drugs Act 1952, s. 12(2)
Drugs Dependants (Treatment And Rehabilitation) Act 1983, ss. 3(1), 6(1)(a), 19(3)

For the appellant - Mahmud Abdullah DPP (Yong Leou Shin DPP)
For the respondent - Voon Lee Shan; M/s Voon & Co

Reported by Usha Thiagarajah

JUDGMENT

Lau Bee Lan JC:
The public prosecutor has appealed against the order of the learned Magistrate made on 26 September 2003 in respect of the respondent (accused in the court below) who pleaded guilty to a charge of intentionally escaping from lawful custody at Pusat Serenti, KM10, Penrissen Road, Kuching pursuant to an order to undergo treatment and rehabilitation therein, being an offence punishable under s. 19(3) of the Drugs Dependants (Treatment And Rehabilitation) Act 1983 (Act 283) ("hereinafter referred to as the Act").

The learned magistrate had ordered the respondent to be released on a bond of good behaviour in the sum of RM5,000 with 2 local sureties for a period of two years from 22 September 2003 (hereinafter referred to as "the Order"). Although the learned magistrate did not state the Order was made pursuant to which section, nevertheless, since there is a record of conviction, it would have to be made under s. 294 of the Criminal Procedure Code ("CPC"). This was confirmed by the learned counsel and learned DPP who accordingly applied for the words "s. 173A" in the notice of appeal to be substituted with the words "s. 294". The court granted the amendment.

The facts of the case adduced by the prosecution are that on 9 March 2000, the respondent was arrested under s. 3(1) of the Act. In the meantime, there were two charges pending against the respondent in the Magistrate's Court. On 20 March 2000 the respondent was sentenced to four months' and three months' imprisonment which were to run concurrently for possession of drugs. On 4 May 2000 whilst serving sentence in prison, the respondent was ordered by the learned magistrate to undergo treatment under s. 6(1)(a) of the Act at Pusat Serenti for two years with effect from 9 March 2000 until 8 March 2002. The term of imprisonment for the two charges ie, four months expired on 10 June 2000. After the expiry of that imprisonment term, the respondent was sent to Pusat Serenti. On 25 August 2000 the respondent escaped from Pusat Serenti with another person by the name of Chin. Chin was arrested on the 21 February 2001 and was charged on 7 March 2001 under s. 19(3) of the Act and was sentenced to 12 months' imprisonment from the date of sentencing. Respondent only managed to be arrested by the police on 17 September 2003. On 22 September 2003 he was brought to court and charged under s. 19(3) of the Act and was released on bond under s. 294 of the CPC.

I find that these facts are consistent with exh. P1, the brief facts of case and exh. P2, Form 3 issued under the Act admitted to by the respondent and with other documents which include the Warrant of Commitment dated 20 March 2000 contained in the Record of Appeal.

At the outset, I wish to state that the respondent has raised three (3) preliminary objections. The first is whether the petition of appeal has been filed in time, otherwise the appeal should be struck off. Learned counsel for the respondent cited subsections 5 and 6 of s. 307 of the CPC. The learned DPP responded that the grounds of judgment was received on 20 October 2003 and the petition of appeal was filed on 25 October 2003 and thus was within the 10 days' limit.

Perusing the Record of Appeal, I am of the view that what the learned DPP actually meant was not the receipt of grounds of judgment but rather the receipt of the notes of proceeding because the learned magistrate did not write any grounds of judgment *per se* in respect of the appeal against inadequacy of the said Order save for the statement at p. 4 of the Record of Appeal as follows:

> In passing the sentence, the court takes into consideration the plea in mitigation by the accused and the court is of the view that a lenient approach should be taken in determining the appropriate sentence against accused in this case.

Be that as it may, the 10 days' limit apply in both instances ie, an appellant has to lodge the petition of appeal within the prescribed period whether he has been served with the grounds of decision or when served with a notice that a copy of the notes of evidence can be obtained if an application has been made for the same. This is evident from subsection 5 read with subsection 4 of s. 307 of the CPC which provides:

> (5) If the appellant within the period provided in subsection (1) for lodging his notice of appeal has applied for a copy of the notes of the evidence recorded by the Magistrate at his trial he shall lodge his petition of appeal as provided in subsection (4) [within ten days after the copy of the grounds of decision has been served]
>
> (a) within the period provided by such subsection; or
>
> (b) **within a period of ten days from the date when a notice** is left at his address for service specified in subsection (2) **that a copy of the notes of evidence can be had free of charge.**
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> whichever period shall be the longer. (emphasis added)

The 2nd preliminary objection of the respondent is that there is no intitulement stated in the notice of appeal and the notice of appeal should be struck off. In this regard, I agree with the learned DPP, the case of *Chong Siew Choong v. PP* [1996] 2 CLJ 823 is distinguishable in that it pertains to a miscellaneous criminal application with regard to an application to the High Court to hear a case registered in another High Court. In any event, not only is it irrelevant; it is also not binding on this court. Furthermore, the governing provisions in respect of appeals to the High Court is Chapter XXX of the CPC encompassing ss. 303A till 322. It is to be noted that nowhere in these provisions is there any requirement for any intitulement to be cited in a notice of appeal to be lodged.

The 3rd preliminary objection relates to the point that the notice of appeal states "The appeal is against the inadequacy of order" and it was submitted by the respondent that nothing pertaining to "sentence" should be entertained by the court. The learned DPP conceded that para. 2 of the petition of appeal makes several references to the word "sentence".

I agree with the learned DPP that the error in not using the word "order" in the petition of appeal has not caused any miscarriage of justice to the respondent bearing in mind that the notice of appeal expressly states against "inadequacy of order" and the respondent had signed the bond of good behaviour with his two sureties when the learned magistrate imposed the order. Relying on s. 310 of the CPC and the case of *Veerasingam v. PP* [1958] MLJ 76, the learned DPP has orally applied to the court to substitute the word "sentence" with "order".

Section 310 of the CPC provides:

> *A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.* (emphasis added)

In construing the aforesaid section, the Court of Appeal in *Veerasingam*'s case *(supra)* at p. 79 opined:

> In the present proceedings it is not for us to lay down any rule as to how the powers of the Court under section 310 are to be invoked. *The ordinary way of doing so is clearly by notice on Motion though that would always be subject to such directions as the Judge might give in terms of the section. Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed.* (emphasis added)

Mindful of the fact that there is no express form upon which the application under s. 310 of the CPC has to be made and coupled with the fact that no prejudice whatsoever has been caused to the respondent, I allow the oral application of the learned DPP in order that substantial justice may be done in this appeal.

Learned counsel for the respondent also raised the point that Form 3, the order dated 4 May 2000 made pursuant to s. 6 of the Act upon which the respondent was detained at Pusat Serenti for two years (hereinafter referred to as the "detention order") was defective due to the failure to specify the relevant party that was supposed to supervise the respondent after his release from detention by omitting to make the appropriate deletion.

The learned counsel has urged the court to exercise its revisionary powers under s. 323 of the CPC and/or its inherent powers. I find that this contention is devoid of merit and inappropriate for the court to exercise revisionary powers under s. 323 of the CPC. The reason being that pursuant to s. 325 of the CPC, the court in the exercise of its discretionary revisionary powers can only exercise those powers conferred by ss. 311, 315, 316 and 317 of the CPC. A perusal of ss. 311, 315 and 317 pertaining to stay of execution pending appeal, to arrest of respondent in certain cases and order to take further evidence respectively reveal that they are not applicable in addressing the respondent's request to rectify the detention order. Even, s. 316 which deals with decision on appeal in particular subsection (c) cannot be invoked because the power of the judge at the hearing of an appeal "from any other order" is only to "alter or reverse such order" but the judge is not empowered to quash or invalidate the detention order.

Therefore, I agree with the learned DPP that the detention order cannot be quashed save that another application be made accordingly for a *habeas corpus* order.

This was the procedure adopted in the case of *Muhammad Atam Abdul Wahab v. Minister of Home Affairs & Anor* [2000] 8 CLJ 402, wherein the applicant who had been detained under the Act pursuant to a magistrate's order claimed that the said order was flawed.

I now turn to the merits of the appeal. The grounds advanced by the appellant are basically:

(1) the sentence is in the circumstances is manifestly inadequate as the learned magistrate did not consider the purpose of sentencing for cases of this nature;

(2) the order of the learned magistrate failed to reflect the gravity and seriousness of the offence;

(3) failure of the learned magistrate to strike a balance between public interest and that of the respondent's. In support, the cases of *PP v. Teh Ah Cheng* [1976] 2 MLJ 186 and *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 were cited; and

(4) the respondent's plea of guilty should not be given undue weight since he has no defence to the charge as he had escaped from lawful custody. *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 was cited.

On the other hand, the respondent maintained that the order of the learned magistrate should not be varied primarily because:

(1) based on the authorities cited, *Teo Siew Peng & 4 Ors v. Public Prosecutor* [1985] 2 MLJ 125; *Tan Tek Seng @ Tan Chee Meng v. Public Prosecutor* [1990] 2 CLJ 103; [1990] 3 CLJ (Rep) 196, *Public Prosecutor v. Yap Chong Fatt* [1963] 29 MLJ 136; *Public Prosecutor v. Mohamed Nor & Ors* [1985] 2 MLJ 200 and *Public Prosecutor v. Lim Hong Chin* [1994] 1 CLJ 79, all of which involved offences punishable with more severe punishment, yet the accused persons were bound over under s. 294 of the CPC;

(2) following *Jayanthan v. PP* [1973] 2 MLJ 68, the term "shall be liable" do not make the term of imprisonment is mandatory; hence the respondent can be bound over under s. 294 CPC;

(3) there were extenuating circumstances because the respondent was subject to abuse by the officer-in-charge of the Pusat Serenti; and

(4) the respondent has pleaded guilty; did not use any violence; first offender; and the usual mitigation of being married with one child with aged parents to support and was assisting his elder brother who had failing eyesight in his business.

It is trite law that an appellate court is slow to interfere with any sentence or order imposed by the lower courts unless it is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts or circumstances (per Abdul Hamid CJ Malaya) (as he then was) in *PP v. Mohamad Nor & Ors (supra)* at p. 202.

In imposing the order, the learned magistrate said that he had considered the respondent's plea in mitigation and had to adopt a lenient approach. The question is has the learned magistrate erred in any manner. Is the learned magistrate justified to do so?

The offence for which the respondent has been charged with under s. 19(3) of the Act states that on conviction the respondent shall be liable to imprisonment not exceeding five years or to whipping not exceeding three strokes or to both. I agree that following *Jayanthan*'s case *(supra)* imprisonment is not mandatory. Notwithstanding that, from the punishment provided by law it can be seen that the offence is a serious offence, being of a custodial nature rather than imposition of a fine.

However, it is regrettable that the prosecuting officer in the court below informed the court that the respondent had no previous conviction and did not press for a deterrent sentence. Far from being a first offender, the respondent had two previous convictions having been sentenced to four months and three months' imprisonment (to run concurrently) for two offences of possession of dangerous drugs under s. 12(2) of the Dangerous Drugs Act 1952. The respondent escaped from Pusat Serenti about two months after being detained there and was only arrested about three years later.

Looking at Form 3 dated 4 May 2000 entitled "Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 (Perenggan 6(1)(a) dan subseksyen 6(2)) Perintah Menjalani Rawatan dan Pemulihan di Pusat Pemulihan dan Menjalani Pengawasan", the respondent was sent to the Pusat Serenti Kuching, Sarawak, to undergo treatment and rehabilitation for two years. Upon completion of that prescribed period he is subjected to several other conditions as follows:

(b) selepas itu menjalani pengawasan oleh *Pegawai Pemulihan/Pegawai polis/ pegawai polis tentera/pegawai memerintah selama tempoh dua tahun di bawah syarat-syarat yang berikut:

(i) orang tersebut hendaklah tinggal di kawasan NO. 393, JALAN CHAWAN, KUCHING, SARAWAK;

(ii) orang tersebut hendaklah sentiasa memberitahu pegawai tempat kediamannya dan tidak boleh menukar tempat kediamannya atau meninggalkan kawasan tempat kediamannya tanpa kebenaran bertulis Ketua Pengarah;

(iii) orang tersebut hendaklah melaporkan diri di JABATAN NARKOTIK, SIMPANG TIGA KUCHING (sebagaimana yang ditetapkan oleh Majistret) tidak lewat dari 72 jam setelah dilepaskan dari Pusat Pemulihan dan pada MINGGU PERTAMA haribulan tiap-tiap bulan kalendar antara 6.00 pagi dan 6.00 petang;

(iv) orang tersebut tidak boleh mengambil, menggunakan atau memiliki apa-apa dadah berbahaya;

(v) orang tersebut hendaklah menjalani apa-apa ujian pada bila-bila masa dan di mana-mana tempat sebagaimana yang diperintahkan oleh pegawai; dan

(vi) orang tersebut hendaklah menjalani apa-apa program bagi pemulihan penagih dadah yang diadakan oleh Kerajaan.

Form 3 is a combination of the Forms 3 and 4 entitled "Order To Attend A Rehabilitation Centre" and "Order of Supervision" contained in the Schedule to the Drug Dependants (Treatment And Rehabilitation (Forms) Rules 1983. The contents of Form 3 is self-explanatory and it is crystal clear that the period of detention and the supervision and the other rehabilitative methods stated therein are aimed to secure the well-being of drug dependants ultimately, the respondent included.

I respectfully disagree with the learned counsel's submission that the offence is technical and trivial. Reconciling the objective of the legislation, which is to treat and rehabilitate drug dependants and the respondent's individual interest, the court would be failing in its duty as a custodian of justice if it does not mete out an appropriate sentence, which would serve as a deterrent sentence to the respondent and other likely offenders. Furthermore, in the context of the respondent, having been certified to be a drug dependant it is in the his interest that he remains at the Rehabilitation Centre so that he could outgrow his drug addiction and to prevent him from the likelihood of progressing to more serious drug offences and be a menace to society.

With due respect to the learned counsel for the respondent, I find there are no extenuating circumstances in this case. Indeed if there is any ring of truth in the respondent's allegation (that he has been abused), why is the respondent not earnest in lodging any complaint or report to safeguard himself from the time he escaped till his arrest, bearing in mind that it would be in his interest to do so as he is bound to comply with the various directions under the detention order and failure to do so has penal consequences. There is therefore, no proof of such abuse caused by the officer-in-charge as alleged.

For the aforesaid reasons, I find that I am compelled to interfere with the order of the learned magistrate which is undoubtedly inappropriate in the circumstances. Pursuant to s. 316(c) of the CPC, I alter the order and sentence the respondent to twelve (12) months' imprisonment.